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## ► **Lilly Ledbetter Fair Pay Act Becomes Law**

On January 29th, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009. The Ledbetter Act was a direct response to the U.S. Supreme Court’s 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, in which the Court held that Ms. Ledbetter’s Title VII claim against Goodyear was barred by the statute of limitations. By redefining when a discriminatory act is deemed to occur, the Act will allow additional employment discrimination claims to proceed to trial. The likely result will be more backpay awards, and also greater liability for compensation-based benefits.

### **The Ledbetter Case**

Lilly Ledbetter was a Goodyear employee from 1979 until 1998. Due to discriminatory evaluations by supervisors in the early years of her employment, she had consistently received lower raises than her male colleagues. By the end of her employment, this had resulted in her receiving only 70-85% of the salary earned by males. She learned of this pay differential only at the end of her career, however, which was when she asserted her Title VII claim.

Under Title VII, a plaintiff must file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. (This deadline is 300 days in a state that permits the filing of discrimination claims with a state or local agency. A majority of states do so, although not the state of Alabama, where Ms. Ledbetter lived and worked.) Ms. Ledbetter claimed that the early discriminatory performance evaluations by her supervisors resulted in disparate pay throughout her career, and that they should be actionable because she filed her charge within 180 days of

receiving a paycheck that had been affected by them. The jury found that Goodyear had discriminated against Ms. Ledbetter on the basis of sex, in violation of Title VII, and awarded her backpay and damages.

This award was reversed on statute-of-limitations grounds by the Eleventh U. S. Court of Appeals. Ms. Ledbetter asked the Supreme Court to reinstate the award in her favor, arguing that each paycheck affected by discrimination should be treated as a separate discriminatory act for purposes of calculating the 180-day window. The Court disagreed, holding that each discriminatory pay increase decision triggered the 180-day statute of limitations, not the individual paychecks resulting from that decision. Because the discriminatory performance reviews occurred more than 180 days before Ms. Ledbetter asserted her claim, the Court held that her claim was time-barred.

### **Congressional Action**

In rejecting Ms. Ledbetter’s appeal, the Supreme Court noted that her argument would allow a plaintiff to file a charge and lawsuit now for an alleged discriminatory pay decision or performance review that took place even decades earlier. Congress has made clear in the text of the Ledbetter Act, itself, that this is exactly what it intends.

The Act amends not only Title VII, but also the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”), and the Rehabilitation Act. Each of these Acts is modified to “clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice.” The law states that an unlawful employment practice occurs “when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an



individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

The recovery or remedy period under Title VII (which is applied to other discrimination laws by reference) is different from the 180-day or 300-day time period for filing a charge. The remedy period is generally limited to the two years before the charge was filed. In other words, a discriminatory pay charge that is timely filed may result in the employee's recovery of the pay differential for up to two years prior to the filing of the charge, as well as any discriminatory payments that were received after the charge. Compensatory and punitive damages and reasonable attorneys' fees can also be awarded to a prevailing plaintiff.

The Act carries an effective date of May 28, 2007 – the day before the Supreme Court decided the Ledbetter case. All claims of discriminatory compensation that were pending on or after that date are subject to this new analysis.

### Effects of the New Law

Congress intends this Act to remedy cases of disparate pay like that of Lilly Ledbetter's. Disparate pay cases can be difficult for employees, because pay rates are often not openly disclosed. It is therefore likely that many such cases – years and even decades old – will be brought under this new statute-of-limitations analysis once an employee in a protected class learns that his or her pay rate does not equal the pay rate of a similarly situated employee outside the protected class. (Of course, the Ledbetter Act will not resurrect claims of former employees unless they have received compensation within the previous 180- or 300-day period that was affected by the earlier discrimination.)

Employment discrimination claims are not limited to wage differentials. Benefits or "other compensation" may also be the basis for a discrimination claim. Other compensation could certainly include bonuses, whether or not they are related to wages. Benefits that are based on compensation might include pension accruals, employee 401(k) contributions, matching or other employer contributions, and any other benefit payments needed to make the employee whole.

As a result of this Act, employers will be forced to look for records that have long been forgotten (or may never have existed) to defend cases they thought would never

be filed. Even more difficult to find than old pay data will be reliable evidence of job descriptions, job duties, performance records, and how and why pay decisions were made. Additionally, as the length of time after a pay decision increases, employers will find it more and more difficult to find management witnesses who recall the events in question.

### Practical Steps Going Forward

In light of the Ledbetter Act, employers may want to consider taking some or all of the following measures:

- Analyze their present compensation system, including salary/wage ranges and rates, bonuses and benefits. A compensation system will be far easier to defend if compensation is set for the "position," rather than the "individual."
- If length of service or experience is to be a factor in compensation decisions, it will be best to use a uniform approach – at least within a job classification. Define what the term "relevant experience" means (e.g., total years performing a specific and related jobs at the organization, outside similar experience, time in position, etc.).
- If merit or performance is a factor in compensation determinations, it will be helpful to have a documented evaluation process that uses objective measurements to the greatest extent possible and that requires specific examples and documentation in subjective areas. Make sure disciplinary action for an employee is reflected on the employee's performance evaluation. Review performance evaluations to ensure that the comments are consistent with any disciplinary action imposed during the review period.
- Managers should be trained to review evaluations and compensation decisions by their supervisors very carefully for consistency and documentation. It would be helpful to have a centralized final review (e.g., by the HR department) to further ensure consistency and appropriate documentation.
- All managers and supervisors having input into evaluations and compensation decisions should be trained on the nondiscrimination laws.
- Perform any analysis of a potentially discriminatory compensation level for one or more employees with great care. It is usually best that such an analysis be done by counsel or at the direction of counsel to attempt to maintain attorney-client confidentiality.
- Conduct regular analyses of compensation within a job title to identify if there are disparities that cannot be justified. Consult with counsel about how best to approach correction.



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- Be careful about using overly broad job titles that cover a wide range of duties and differing pay rates. Such a system may make it more difficult to prove the particular duties assigned to various employees within the job title as a justification for the pay differences.
- Adopt an internal process that would allow employees to raise concerns about compensation so that issues can be addressed early on, or expand an existing EEO policy to include specific procedures for filing internal complaints about compensation discrimination.
- Maintain all compensation plans and supporting data (e.g., salary/wage administration plans and procedures; bonus, commission, incentive and other supplemental compensation plans; calculations of such compensation, etc.). Make sure each document includes the date it became effective so that it will be easy to determine the time period to which it applies. Keep records of the criteria used to determine the amounts and recipients of any discretionary bonuses.
- Reconsider a records retention policy to determine how it will impact any evidence of past and current compensation, how and why compensation decisions were made, job descriptions or other evidence of the duties and responsibilities of positions and individual employees, performance evaluations, disciplinary records, and any other documentary evidence related to individual compensation issues.

Employers may want to consult with counsel about appropriate changes to the records retention policy for their particular situation.

- In responding to charges of discrimination in general, be careful when producing compensation information on employees similarly situated to the charging party, even if the charge is not a compensation discrimination charge. If the furnished information indicates that the charging party was paid less than others, it could prompt an investigation into compensation discrimination.

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